

CENTER FOR APPELLATE LITIGATION

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ISSUES TO DEVELOP AT TRIAL

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This ITD focuses on an increasingly common situation: prosecutions built entirely or substantially on video footage with no human witness and sometimes nothing else at all – no forensics, CSLI, statement, informant, etc. In such situations, the jurors are the identifying witnesses, and they must assess the reliability of their own identification based on the video footage.

There is, at present, no CJI charge that fits this scenario, yet, in our view, there are proper factors that a jury should consider as they assess whether the prosecution has proven that the person on the footage is your client. Cf. People v. Mosley, 41 N.Y.3d 640, 650 (2024) (advising that a cautionary instruction is appropriate where a lay witness makes an identification from video, “reminding the jurors that because they are the finders of fact, it is their opinion as to whether the defendant is depicted in the surveillance footage that matters”).

To that end, we’ve put together a proposed charge, a hybrid of (1) the CJI identification instructions; (2) the CJI non-eyewitness/video identification instruction; and (3) the Court of Appeals’ emphasis that the jury remains the ultimate evaluator of photographic and video evidence. We propose that, in a case where you deem it helpful to your client, you submit the suggested instruction below on the record and in writing when the prosecution relies on video footage rather than identification witnesses. This is not intended to replace the court’s identification charge but to supplement it with relevant considerations in a video-footage identification case. Perhaps the court will grant your request; if not, your appellate colleagues will be delighted to raise the issue on appeal.

Proposed Charge: Identification Based Solely on Video Evidence

The People contend that the defendant is the person depicted in the video recording admitted into evidence and/or photographic stills from such recordings.

No witness has identified the defendant as the person shown in that recording. Therefore, whether the defendant is the person depicted is a question for you alone to decide.

In determining whether the People have proven beyond a reasonable doubt that the defendant is the person shown in the video, you should carefully examine the recording and consider all of the circumstances bearing on its reliability and usefulness as evidence of identity.

Among the factors you may consider are:

1. the quality, clarity, and resolution of the recording;
2. the lighting conditions;
3. the camera angle and distance from the person depicted;
4. the length of time the person is visible;
5. whether the person's face is visible and, if so, the extent to which facial features can be observed;
6. whether the image is affected by shadows, obstructions, motion, blur, pixelation, or other distortions;
7. whether any distinctive physical characteristics are visible;
8. whether the person's height, build, gait, posture, mannerisms, or other observable characteristics can be assessed from the recording;
9. whether any clothing or accessories visible in the recording are distinctive or, instead, are common and unremarkable;
10. whether the recording has been enlarged, enhanced, slowed, paused, zoomed, or otherwise altered for viewing purposes; and
11. any similarities or differences between the appearance of the person depicted and the appearance of the defendant as shown by the evidence.

You may consider both the similarities and differences between evidence of the defendant's actual appearance at the time of the offense and the appearance of the person depicted in the video footage. You should not speculate about features that cannot be reliably observed from the recording.

The fact that a person depicted in a video recording may resemble the defendant is not, by itself, sufficient to establish identity beyond a reasonable doubt. The People must prove beyond a reasonable doubt that the defendant, and not merely someone who shares similar characteristics, is the person depicted.

If, after considering the recording and all of the evidence, you are not convinced beyond a reasonable doubt that the defendant is the person shown in the video, then the People have failed to establish identity and you must find the defendant not guilty.

TWO IMPORTANT POINTS:

1. At the charge conference, tell the court that, to the extent the court does not accept the precise proposed language and factors laid out above, it should nevertheless provide *some* instruction on the factors governing its assessment of photographic or video footage and instruct the jury on the principles outlined above after the numbered list.
2. Cite to CPL 300.10(2) ("The court must also state the material legal principles applicable to the particular case, and, so far as practicable, explain the application of the law to the facts"), *see, e.g., People v. Boone*, 30 N.Y.3d 521 (2017); *People v. Whalen*, 59 N.Y.2d

273 (1983), and the state and federal due process clauses. Argue too that, to the extent that the court concludes that the federal due-process clause does not require the instruction, the more-protective state-due-process clause does.